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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

Filed Apr. 22, 1902.

CHRISTIAN SCHWARTZ ET AL.,
Plaintiffs below and Appellants,

vs.

JOHN S. DUSS ET AL.,
Defendants below and Appellees.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY TO APPELLEES' BRIEF OF ARGUMENT.

GEORGE SHIRAS, 3RD.
S. SCHOYER, JR.,
Attorneys for Appellants.

PITTSBURGH PRINTING COMPANY, 531 WOOD STREET, PITTSBURGH, PA.

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REPLY TO APPELLEES.

Although the burden of sustaining the several Assignments of Error rests upon appellants, the appellee's brief exceeds by nearly one hundred pages the argument of appellants. By reason of its discussion of questions, largely, extraneous to the Assignments of Error, its seeming perversion of the appellant's positions and by its failure to candidly meet the issues in this case, we feel impelled to make a brief reply.

No abler or more ingenious counsel can be found in Pennsylvania than the gentleman who prepared the opposing brief; his failure to indulge in brevity and directness shows, in our judgment, disposition to so becloud the real issues that matters will be left in *statu quo* in so far as the relief sought by the appellants are concerned. Otherwise why are more than one hundred and fifty pages devoted to matters having but the slightest bearing on the present Assignments of Error, and only a small portion of the remaining brief to a discussion of these assignments?

The foundation charge in this proceeding is: that Mr. Duss has deliberately set about to wind up the Harmony Society, of which he is the sole trustee, and under the articles and under the evidence, its exclusive financial manager and despotic patriarch; that he has accomplished this by: (a) getting rid of seventeen active, vigorous members under deeds of purchase and partition, based upon manifestly false valuation of existing assets; (b) by the death of seventeen aged members since he became trustee and his failure to elect a single new member into the society for the past nine years; (c) by turning the home of the society and all its outside real estate over to a private business corporation controlled by a Board of Directors, most of whom are non-members, with its actual place of business in the City of Pittsburgh, far beyond the scrutiny of the alleged Board of Elders, and wholly and absolutely independent of their control or management; (d) by the reduction of the survivors to a few ignorant women, so that Mr. Duss and his wife now compose one-fourth the total membership of this once vast communistic society, leaving no member to be governed and not a sufficient number to fill the eldership and trusteeships, and such as they are utterly incapable of standing in the way of any plan contemplated by Mr. Duss;

and finally (e) should this Court fail to reverse the lower Court or modify its decree, it necessarily lies in Mr. Duss' power to still further reduce the survivors, numbers having then been held to be wholly immaterial. In that event he and his wife alone remain as the owners of over five million dollars' worth of assets, and as no restriction has been placed upon the sale of the stock certificates of the Union Company, this couple, admitted since 1890, constituting the Harmony Society, can quietly leave for foreign lands, and the question of what becomes of the property "after" dissolution will no longer be an enigma for the Courts of this country to solve, for "the riches will have taken wings" and nothing will remain within the hands of a chancellor for distribution, while the Court costs of this litigation, amounting to over ten thousand dollars, are left as a sole reward for the half dozen Dutch farmers, who, indignant at the spoilation of their ancestors' interests and the heartless desecration of their remains, saw fit to apply to a chancellor to stay the hands of these parties, seeking by this litigation not the enrichment of themselves, but simply a distribution of the assets of this defunct society among all the donors, and their legal representatives.

Practically no answer is made to these propositions in appellant's printed argument, until we reach page 159 of their brief, where respectively, under the heads of "Has the Harmony Society been Dissolved"—"Union Company"—"Present Paucity of Members"—"Withdrawal of Members," pages *159* to *183*, inclusive, do we find a reply to our contentions. Just *23* pages out of *231* devoted to these issues. In connection with this reply we most earnestly ask this Court to read therewith these *23* pages. It will appear, we think, with startling plainness the weakness of the apellee's reply and explain the diffusive and largely irrelevant character of the most of the preceding pages.

THE APPELLEES NOW OPENLY PROCLAIM THE RIGHT TO TAKE TO THEMSELVES INDIVIDUALLY ALL THE PROPERTY OF THE HARMONY SOCIETY.

When this litigation first began, the defendants confronted with the direct and specific charge that they contemplated dissolving the society and secretly dividing its assets among themselves by a process of private liquidation, and without notice to the heirs of the deceased donors, in the most indignant terms, denied these accusa-

tions. In paragraph *21*, page *43*, Record, of Mr. Duss' answer, is the following emphatic declaration to our charge in the bill that he was intent upon winding up the society as aforesaid:

"Each and all the allegations of the Twenty-first paragraph *are "utterly and absolutely false. I have never for a moment conceived "or had any purpose of winding up the society or any desire to have "the remaining members thereof withdraw."*

And in paragraph six of the Defendants' General Answer they say: "That all the members especially covenanted with each other "that the said common fund and property of the society should be "and *remain* joint and *indivisible* stock."

On the witness stand, and with the same assumed indignation, denials were made that the society is being dissolved and all sorts of extraordinary excuses and subterfuges were indulged in to account for the many acts that point, we contend, unerringly to liquidation and dissolution. However unjust, or however against the weight of the testimony and the circumstantial evidence, it may have been the lower Court held that the society was not being dissolved, nor did the acts complained of indicate any intention to dissolve the same, *and on this ground alone* the Circuit Court and the Court of Appeals dismissed the bill, saying that the society not being dissolved the question of where its assets went were not properly before them.

The appellees therefore being relieved of these accusations by the Court accepting their sworn answers and their testimony, and now fortified by theseveral decisions in this case in their favor, proceed to boldly throw off the cloak and stand revealed as the very characters we depicted them to be from the first, viz.: the pre-arranged survivors acting as private liquidators and distributees of the Harmony Society's trust estates.

Mark the following from the Appellees Brief, page 85:

"It is the society, as a society, which owns this property. It is "the entire body as one whole. *If at any time the society did dis-"solve its property* would go to the persons who *then* were its mem-"bers. *No one else has any legal or equitable claim to it except "those members. To them, and to them alone, it would belong, and "among them it would be divided."*

And page 88:

"It seems therefore plain that if at any time all its members "agreed to a dissolution, that would be the end of it. It exists "merely because of the co-operation of its living members. When "once all these members agree not any longer to *co-operate*, not any "longer to carry on the society it of necessity would terminate."

In other words, Mr. Duss now asserts throughout the argument that if this bill is dismissed he can proceed to dissolve the society, and all that it requires to do this is for his wife and the four or five women remaining, most of them admitted since 1890, to "agree not any longer to co-operate" and that *"would be the end of it."* What a simple proposition all this is. A society that has existed for nearly one hundred years; that had a constitution, and a precise method of government; with doctrines prescribing and regulating the temporal and spiritual welfare of each member; a society that received all its property under a covenant intended to maintain and perpetuate its system, and which in express language provided that all of said property should *"forever* remain indivisible stock," can now be divided among the present members who signed this very covenant.

This is the present attitude of this recent member, who, in his answer, said that he "never for a moment conceived or had any purpose of winding up the society." Can it be that he only has his counsel devote many pages to this proposition of his ability to wind up the society and take all the property, as an evidence of his good faith, and notwithstanding being thus able to take all these millions he still resolutely refuses to do so! The temerity of such declarations at the present date seems almost inconceivable.

> The equities are with us
>
> "Whoever claims against the laws of descent must show a written title which the Court can with satisfaction decide to be sufficient."
>
> Lipman's Appeal, 30 Pa. 189.
>
> There is no such written title.

An intent to create such an estate is inconceivable. Is it supposable that the creators of the trust bound themselves as they did to grant and convey all their property in possession, remainder, reversion and in expectancy, and to defeat their heirs, all for the benefit of some ultimate man, whom they never dreamed of, whose very right to so claim, necessarily contemplated the death of the society, which they believed was to exist until the millenium, and in the face of the contract that this property should be forever indivisible? The very word society is inconsistent with survivorship. The system of a Patriarchal government implies members to be governed, and from the begnning to the end of the articles there is no period fixed for the termination of the life of the society. There is no remainder over and no provision of any kind for the disposition of the trust estate in the event of the extinction of the society.

While we cannot undertake to consider or answer in detail very many contentions of the appellees, we desire to make a few corrections and point out several conclusions that we cannot permit to stand in appellees printed argument with our assent or acquiescence.

CRITICISM OF APPELLANT'S HISTORY OF THE CASE.

Appellee's counsel take exception to our history of the case and devotes a number of pages to the same. Had they kept in mind the last sentence in our statement they would have understood, perhaps, our position a little better, to wit, "The principal facts are admitted in this case—*the differences arise on the legal inferences to be drawn therefrom.*" In other words, the very portion of the History of the Case to which he makes most objection is that which is based upon the present Assignments of Error. We contend that, taking all the facts collectively and drawing the fair and legal inferences therefrom, the Harmony Society is now dissolved, and that the present defendants are in possession of its trust properties; and if not prohibited by this Court will take it to themselves, or so waste or distribute the same that nothing will remain of this property.

It will be for this Court to say whether we are correct in our contentions and in our conclusions.

It is rather odd that appellee's counsel in this criticism of our history of the case starts out with a noticeable mis-statemnet, *vide*, page 204: "The releases of all withdrawing members are in the master's report and add nothing to appellant's case." Not only are all these releases *not* in the master's report, but not a single one of them, although they are, in one aspect of this case, of the very highest importance. Not only this, but the master even fails to give the slightest summary of them or discuss their legal effect, which we may say is only in keeping with his entire method of considering the complainant's several positions; further than this, appellee's counsel, in his brief, does not print these so-called deeds of liquidation, but attempts to belittle their significance. Like the master, he prefers to ignore them.

It is further asserted that we are mistaken in saying that Mr. Duss and his wife first violated the rule against celibacy in occupying the Great House. We still assert it. After celibacy was adopted

the husbands and wives lived apart even where they may have occupied the same premises, and there is no evidence whatever that Father Rapp, after the adoption of celibacy had a wife or violated this rule. In regard to all the members generally the same answer can be made; for while it is true that many married people originally came into the society, none were married therein, and until lately all lived apart, and completely severed their conjugal relations. This fact has been judicially recognized in every case in which the society appears, and the mere citation by the master of early records that showed husbands and wives living in the society does not of itself prove a violation of the doctrine of celibacy. As stated in our brief the Court of Appeals held that celibacy was one of the principles of the society, and if it were not the absolute rule, is it not most strange that a marriage ceremony is wholly unknown in the society.

But we have only to quote from the defendant's own answer to prove that celibacy was a principle [page 1, page 21, Record]:

"In 1807, different members of the society advocated the efficacy of celibacy, and since then this doctrine has been followed and practiced by a great number, if not all, of the members of the Harmony Society."

That Mr. Duss—the sole trustee—living with his wife and children in the Great House, has dealt a blow to this cardinal principle of this communistic society needs no argument. Duss' children, who are not members, stand exactly in the same class as the appellee's—so if he is successful in obtaining all the society's property—they, the abhorent class to which we belong, will eventually get it too. Celibacy was primarily intended to prevent the temptation that arises from family intrigue and the like—so destructive to this form of communism.

Appellee's counsel further criticises our assertion that Mr. Duss bought out members of the society and induced them to leave. These assertions we still strongly adhere to, and they are distinctly a part of the plaintiff's case.

Appellee's counsel denies that the master was appointed because Mr. Duss refused to answer questions, but because we asked improper questions. It is unnecessary to discuss this other than to say that the fact of having a master at all grew out of controversies in connection with the admissibility of evidence, and that the master was appointed for no other reason, although under the agreement, he was authorized to submit his report on the law and facts to the Circuit Court.

This submission to the Master proved most unwise for the appellants, for reasons wholly distinct from his decision, and since his

decision we have been practically unable to have the lower tribunals give any independent consideration to the questions of law that are herein presented, and we therefore have the case standing to-day upon the alleged conclusions of law by the master. This we consider remarkable for a case of such importance, and especially where many of the questions of law have been practically ignored, though the exceptions to the master's report invited their consideration.

Again, appellee's counsel asserts that we introduced the financial affairs of the society into this case and that compelled the master to give so much consideration to them. In this he is completely in error. We objected most strenuously to the manner in which the record was burdened with hundreds of pages of book accounts and trifling financial data that was wholly foreign to the question raised by us. Our position on this subject is clearly defined on page *20 and 21* of our History of the Case, and we think that if this Court will examine the dozen of pages of book accounts and inventories in the master's report it will appear how foreign such items are to the question raised by us. The appellee's reference to the Kroll-Weggel matter and Duss' purchase of members' interests will be considered subsequently.

NO TERMINAL PERIOD.

On page 93 of appellee's brief, in treating of the effect of the absence of express provisions for a dissolution, counsel asks: "How does that help the plaintiffs?" Our answer is in two ways:

1st. That such a system of collecting and carrying accumulations forever is in plain contravention of the rule against perpetuities, and for this reason such indefinite accumulations of real estate and personal property makes it mandatory upon the Court to direct a dissolution, if one has not already occurred.

2nd. The failure to provide a terminal period shows a direct intention not to create joint tenancy or tontine for the present survivors. The reason that the Court gave Nachtrieb his share in the society was because the society broke its agreement with him (by his unjust expulsion) and had he died before bringing suit for his interest his heirs undoubtedly would have received his share. In this case no other questions were raised and the Court determined, the society not having been dissolved, that this was proper remedy for Nachtrieb. Now, however, the society having become terminated by those entrusted with its perpetual continuation, and there existing no practical way by which this Court can compel its continuation

and the observance of all the customs, rules, principles and regulations, set forth in the Articles of Association, it seems plain to us, therefore, that the contract has now been broken with all the donors, and the property goes to them, or their heirs, by way of resulting trust.

"FOREVER JOINT AND INDIVISIBLE STOCK."

Appellant's counsel must admit their inability to follow the sinuous argument of opposing counsel in the chapter discussing the "Duration of Society" (page 8), "Living Members in Absolute Control of Property" (page 89), and "Joint and Indivisible Stock" (page 97).

In treating of the "joint and indivisible" stock he says (page 97):

"It is admittedly joint, that is the society's property; which society "was composed of individual members. Being joint it necessarily "included the idea of survivorship. It was indivisible without "unanimous consent—but with it it was divisible."

This may sound very fine, but what does it mean? Just how a society that contracted with ante-cedent donors and had received, under an express trust, property of all kinds, including labor and accumlations, which was to be held by it under a covenant that it should be: "Now and *forever* joint and *indivisible* stock," can have such stock wrested from it and divided among a few subsequent members, when such a provision was undoubtedly inserted for the purpose of keeping away designing applicants, and removing all temptation from possibly unworthy successors in the society who might seek to reap the benefits of this accumulation and even destroy the society in their efforts to seize it, we cannot see. To say that the property which is stamped *"forever indivisible"* shall become divisible when a few subsequent persons who signed this covenant see fit to defeat what they agreed not to defeat, and which their predecessors made a part of their contract is to fly in the face of the plain meaning of a very plain and self-evident provision.

If such a principle of construction was applied to all trust properties on the part of transient beneficiaries none would last very long. It is admitted that this is a communistic society; that it

had an express method of government, practically unchanged down to 1890, except by the substitution of a dual patriarchy or Board of Trustees, on the death of Father Rapp; that it had many definite principles in the Articles of Association relating to the temporal and spiritual welfare of the members; that the property was held by the society as donee, and all were equal givers in the trust property, which was created for carrying out and maintaining such principles. Now, it matters not, whether we, as individuals, agreed with such a scheme of sociology or disapproved of it: such as it was, the creating members had a right as against successive members to provide for its indefinite continuation if they saw fit. Just how Mr. Duss, who signed all these articles can say that it lies in his power not only to wreck the society, but take all its property, we cannot see. If he does not agree with its peculiar tenets, its doctrines and systems of life he should never have sought membership in it, or having gotten unwittingly in and found it distasteful he should have resigned and gone his way again. But no, he prefers to destroy what he agreed to continue and seize what he covenanted not to divide. Can he do this and will this Court be powerless to prevent it?

ARTICLE OF 1836 DOES NOT DISINHERIT IN CASE OF DISSOLUTION.

The frequent reiteration by opposing counsel of the provision of 1836 that no representatives of a deceased member shall be entitled to receive back contributions, or anything else, applies only to a going, living society, and of course the appellants are bound by such provision during the life of the society (leaving out of consideration its dissolution by reason of its violating the rule against perpetuities, &c.). But these provisions were inserted, just as the provisions against the divisibility of the stock, for the purpose of making it possible to continue the society indefinitely. When the society ends by no fault of the appellants but due to the "co-operation" of the defendants, it is most inconsistent to have opposing counsel argue the latter's right to violate the provisions of the articles in so far as they prohibit a division and ask for the enforcement of the same articles against the legal representatives of deceased donors—who are only barred by a living society.

NUMBERS AND RIGHTS OF CLAIMANTS.

QUERIES OF APPELLEES.

Commencing on page 83 opposing counsel in his brief attempts to ridicule the right of the heirs of deceased donors to participate in distribution after a dissolution of the estate.

He says: "The real estate at Economy is its oldest acquisition and the Leetsdale property and all personal property was acquired in later years. It is certain that most of it was acquired in external business or in profits from it."

The property now in controversy really consists of the home tract of three thousand acres and its improvements, which has been conveyed to the Union Company. The outside personal property is of little monetary value. Hence the property in controversy was not largely "acquired by its external business." Again counsel says: "It is also certain that no one of the members could possibly identify the property any ancestor put into the society." Under the Articles of 1836 that is just what was intended, and all were made equal donors irrespective of what they contributed.

Again he says: "Those who left there did so over seventy (70) years ago. How is it possible to now put life into such a claim?" We cannot understand this question, for we make no such claim.

Again on page 83, are a half dozen questions in one paragraph we are invited to answer: "Could the heirs force themselves into the society and demand support?" Answer: We never asserted this proposition. "Could these heirs at any time insist on a partition of the property?" Same answer. "Could they demand an account and if refused force a settlement?" Same answer. "Could one who withdrew do so?" Same answer. "Could the heirs of one who died in the society?" Answer. That depends upon whether the society was dissolved. "Have all the heirs and descendants of all the deceased members of the society a property right in its assets?" Not necessarily; it depends upon the date their ancestors died and whether the society was dissolved. "Have they a right entitling them to interfere in its management?" We never asserted this and never did interfere when the society was alive.

In order to avoid encumbering this case with many questions that really exist in a full consideration of the Articles of Association, we have passed them by in order that the crucial ones could receive the full consideration of this Court. There are many questions much more pertinent than those we have just answered. Take for instance the provision of the Article of 1827 relating to the members giving all their property which they owned: "in possession, or in remainder, or in reversion, or in expectancy." Such a provision, if enforced, would upset our State laws regulating intestacy, testamentary disposition and the prescribed methods of conveyancing; a life tenant of real estate who is not a member of the society and survived a remainderman who was a member of the Harmony Society would find the society a successor to the title; in other words, under this broad clause, one could never tell when outside real estate would vest, just as is the case of all real estate within the society. We give this illustration as showing the illegality of such an association. We have not attempted by a full discussion to embarrass this Court with many questions that might otherwise be raised.

We again cite from appellee's brief, *ante*: "Mr. Duss showed that there had been 1050 members of the society. Our opponents more than double that number."

This is not correct. Our claim from the start is based upon the membership at and subsequent to the Article of 1836. We never said that there were over two thousand such members, but on the contrary say that taking the master's report and evidence, we doubt if there are over four or five hundred that *died in fellowship, leaving heirs,* subject to the Articles of 1836. Christian Schwartz, for instance, is the *sole heir* of *eight* deceased members. If four hundred died in fellowship and have to-day each two living heirs, on the average, that would make eight hundred possible participants, and if the property is worth four millions or over they would each receive about five thousand dollars a piece. But whether it is more or whether it is less is no reason why the appellees should try to belittle the case or the rights of the appellants because such a large number of persons may be interested in the results of this litigation.

The amount we get may not be very large, and especially for the record plaintiffs, who stand charged with the costs—but we are satisfied if we prevail, for some contests are not necessarily to be gauged by the financial results. True this large property

would average much higher per capita if it went simply to Mr. Duss and those he saw fit to share it with. This seems to be one of the reasons opposing counsel gives for not having it distributed in the way we seek.

In reality the appellants represent the Harmony Society—for if they prevail the four hundred deceased donors of the trust have their own flesh and blood reinstated in the line of inheritance, and we may rest assured that if such comes about that the graves of these good people will not long be a part of the capitalistic stock of the Union Company.

UNION COMPANY.

This subject, though one of the most important in the case has been fully answered in our History of the Case, page 15 and Argument, page 123 and we only desire to make a citation from appellee's brief, page 173, which gives the pretended reasons for the organization of the Union Company, and answer the same:

"The facts are that after the debts of the Economy Savings Bank were paid by the society borrowing large loans on long time, new troubles arose. Such suits as the present were threatened which might involve the title of the society to this real estate and prevent the sale to raise money. Then escheat proceedings were threatened which would still further complicate the title."

In the first place the evidence showed and the master found that at the date of the organization of the Union Company, no debts existed except the McCullough mortgage, and to meet this there was over three hundred thousand dollars of the society's securities available. There was no evidence whatever that escheat proceedings were *then* threatened.

The contention that the society had a legal right to abandon its home and give up what alone was the basis of this communistic society founded upon agricultural pursuits because the prior trustees had bought and sold outside real estate for investment or speculation is no answer. A corporation—a charity, a religious

society, or in fact any form of organization having prescribed functions to be performed and organized for their fulfilment may in some cases sell or part with what is not essential to its corporate or formal existence, but wherever they part with property that is essential to the performance of its duties or requirements, it is illegal, perversive, and if the parting of such property proves irreparable then the end is reached, for it cannot continue in some other form, simply because it may have in its possession money or property realized therefrom which cannot be used for the performance of its prescribed duties and requirements. That is just what has happened here; for by this conveyance to the Union Company they have ended the life of this communistic society, destroyed its peculiar methods of government, ousted its officers and set up a new being whose allegiance is to the State of Pennsylvania, and whose laws are the statutes of our State and not the Articles of Association. This is self evident and we will not take the time of the Court further on this point. Our brief, as aforesaid, discusses the other features involved.

We, however, think it most important to call the Court's attention to that portion of appellee's brief on page 174, where the written authorization of the members of the society is cited, giving the trustees power to convey the home and other real estate of the society to the Union Company.

Right in the heart of this agreement and in the midst of a sentence there is cut out of said agreement the most vital thing in it—its elimination being noted by asterists. That such an elimination was not due to its irrelevancy or length is apparent, viz.:

"—now owned and held by said trustees for the benefit of said so-
"ciety to the end that *all said lands, tenements and hereditaments*
"may be *owned, held and conveyed* by said incorporated company
"and *be sold and otherwise disposed of* from time to time in pur-
"suance of proper corporate action *as may be determined by the di-*
"rectors and officers of said incorporated company."

Here by "common consent" we have the surviving members agreeing to the destruction of the trust property and the substitution of its successor, free from their control.

Is it any wonder the opposing counsel cut out the above quotation? The pretense that the Union Company was a temporary expedient is up-set by the absolute character of the conveyance to it and the fact that the alleged crisis passed away years ago.

REPLY TO CONSPIRACIES CHARGED. MR. DUSS' RECORD.

We have already, quite fully, in our Brief of Argument, discussed the subject referred to in the above chapters. Pages 182 to 204, appellee's brief, however, contain a number of erroneous assertions and make such unjust reflections upon the appellants we cannot let them pass. What "conspiracies" have we charged that have not been in reality sustained, or if not, are now before the Court for its determination? In our bill we admitted the Teed scheme had been abandoned by reason of the protest of the older members of the Harmony Society, and our evidence simply related to Teed's presence in the society, as also of his female and male disciples; that they got money from trustees Henrici and Duss, and in many ways showed that this set of mercenary adventurers were in close touch with Mr. Duss, who subsequently took his young female cousin to Teed's house in Chicago [Record pp. 172-173], where she remained more than a year. The master says that there was no evidence of what kind of a man Teed was, or the character of his disciples, or the reputation of his society. Teed's record is so well known that we deemed it unnecessary to burden the record with evidence that was immaterial under our allegations. The Feucht bill, filed by the members of the Harmony Society, three of whom are defendants of record, openly charged that Mr. Duss was in collusion with Teed; hence, surely, the present appellants had such sufficient ground for such belief, and their good faith cannot be questioned.

In regard to Mr. Duss' collusion with Messrs. Hice and Reeves to relieve them of their entire liability to the Savings Bank it is clearly shown; one has only to read the master's report and appellee's argument to see that it was so. We again refer to pages 20 and 21 of our History of the Case.

In regard to the financial affairs of the society we again repeat that most of the trouble was occasioned by Mr. Duss not putting the bank at Beaver, Pa., into the hands of a receiver. *This was his manifest duty.* What right had he to take, without notice to his fellow members, or even with it, practically all of the investment funds of the society and put it into this despoiled bank? Suppose the Harmony Society had an interest in it? Even sup-

pose Trustee Henrici was a partner? Just how such a society could be a partner in an outside business concern, when under its Articles of Association there was unquestionably no power to more than *invest* in *stocks* and *bonds*. The society, as constituted, was intended to live within itself; its necessities were trifling in support of its members. Being a communistic society with agriculture as its foundation and manufacturing all they needed for their own use, it was only intended that surplus funds should be safely invested in outside securities, and there was no power to jeopardize the joint and indivisible stock by contracting joint and several liabilities with persons who were not members of the society. The real debt of the society, outside of the alleged bank liability at this time, was about three hundred thousand dollars, with over a million dollars of first class securities to meet it, as Mr. Duss' subsequent conversion of securities in less than a year clearly shows. Why, therefore, should Mr. Duss claim credit for absorbing all the well invested personal securities constituting part of the society's entire endowment fund? Why were the other partners in the bank not made to pay their share of the debts? By this time the debts are doubtless outlawed. Appellee's brief, page 196, states: "Hice and Reeves each owning one-tenth of the bank were financially weak and unable to assist." Not only did the evidence not show this, but on the contrary indicated they were persons of means and position.

The master places a forced construction upon the character of this liability by his saying it was a "demand" debt. It is more than doubtful if there were any liability for such indebtedness under the evidence shown in this case; but assuming that there was, or that there was a moral liability to pay the same, we respectfully contend that Mr. Duss had no power to act as liquidator of the society's indebtedness. He should have applied to Court for an official liquidation.

PAUCITY OF MEMBERS.

Equally insincere is Mr. Duss' answer to our charge that he had declined to take in a single member for eight years, which was most essential, owing to the death of fifteen members and his purchase of the interests of seventeen others.

Appellees say, page 179: "The number of the Board of Elders is reduced to eight and does include *all* the present living members of the society, but the appellants should not complain of this

because heretofore it was the exclusive nature of the board they objected to."

This attempt to be facetious is a poor argument. It admits that no members are left outside of the very board that was created to govern the membership, and it is admitted that there is not even a sufficient number to compose it, for the board under the Articles of Association, required seven elders and two trustees; but as this board is bereft of all power, and the surviving members are tenants to the Union Company, it may be well said that they are entirely capable of attending to all business that may come before them, for that is none. Again appellee says, page 179:

> "The fulfilment of the will of God can certainly, within limits, be as effectually done by the few as the many. . . . All the members will be as well cared for, as well taught in school and church, better looked after than when the membership ran into hundreds. . . . All this, a society composed of eight will do as well as one hundred and even do it better, for more attention can be given to each member." &c., &c.

Such a reply, to our charge that he refused to take in new members, and by this insidious means strangle the society is sustained by such an argument in its advocacy of few members. To counteract this he says further through his counsel, on page 210, appellee's brief:

> "Would any man or woman worthy of admission join the society when it meant an additional party defendant in this litigation? By joining he or she gave up all their property to the society and promised implicit obedience. Would anyone do this with a lawsuit pending in which it was claimed that all the property of the society should be distributed among all the descendants of members since 1836?'

And these are the answers to our charge that the door has been closed to all admissions. The first argument practically admitting it and the other an insincere and false plea, which the innocent never indulge in.

He says no one would join because they would have to give up all their property, and yet there is no evidence that a single member who joined in the past twenty years ever gave a cent, but on the contrary when Mr. Duss and sixteen others joined, a few years before we filed this bill (to fill vacancies caused by the death of old members), according to the evidence, none of them contributed anything except their labor.

What should so appall a new applicant? Free board, free lodging, free clothing, the rule against celibacy relaxed, an interest in five millions of dollars, which the living members, Mr. Duss says, have the right at any time to divide. Is this so alarming? Then too, if they were dissatisfied they could get "donated out" for five thousand dollars a piece, just as Leonard Hoerer was, who was only in the society ninety days. Would this be unsatisfactory? Then again, if we prevail in this proceeding they share equally with us. Would this be unsatisfactory?

Of course, the real answer, and it is so apparent to those who know the situation, is, that Mr. Duss intends winding up the society just when he sees his way clear to do so, and therefore he is too thrifty to take in a new member when by such action he voluntarily took away from himself and survivors a half a million of dollars. Even in the direct face of our charge, when one would suppose he would make every effort to take a member in, in order to refute our statement, he cannot bring himself to such an act of generosity.

Therefore we ask this Court, taking all the charges against Mr. Duss, material to the present assignments of error, is it not a fact that all are founded upon self evident truths, or are such that the reasonable inferences sustain us. When, therefore, appellees counsel says that all our charges are untrue and it is *"too bad"* to make such reflections, our answer is that most of them can be sustained out of Mr. Duss' own mouth, and upon the argument of his counsel.

COUNT DeLEON'S WITHDRAWAL.

In half a dozen places the appellee argues that the Count DeLeon's withdrawal gives a right to the present defendants to wind up the society and take all the property. The answer is a simple one. From 1805 until 1836 every member withdrawing could reclaim his contributions. Hence Count DeLeon, who left the society *in 1832*, having such a right at that time, upon withdrawal, took out, as he had a right to do, a valued appraisement of their contributions. The reference to Count DeLeon in the printed brief of our learned friend with its frequent reiteration is inapplicable to this case because the merger of all prior contributions given to the society was done four years after that withdrawal by the Article of 1836, wherein was created the joint and indivisible stock, and a prohibition placed upon members voluntarily with-

drawing taking with them any of the property of the society. Since then no member had a right to voluntarily withdraw and receive back his contributions or any other properties as a matter of right; but what occurred prior to 1836 we have no interest, and it matters not whether DeLeon's withdrawal was legal or not, for our rights were not affected thereby, and are based upon contract relations beginning thereafter.

APPELLEES NOW SEEKING TO REVERSE THE LOWER COURT.

Having failed to get a decision or even a dictum that made it absolutely safe to take this property (while claiming their right now to do it) except under the system in vogue of buying up the "interest" or "shares" of living members, and switching the assets into all sorts of shapes where it became less and less recognizable as trust properties of the society, the appellees now try a new course. As set forth in the preceding chapter, page 2, they assert a legal and equitable right to all the property and declare their power to dissolve for that purpose whenever they see fit to so do.

Judge Acheson held, page 195 of record:

> "It is unnecessary or would it be proper for the Court to express any opinion as to what would be the legal status and ultimate disposition of the property of the Harmony Society were its existence terminated by the death of all its members, or were the dissolution of the society otherwise affected."

On page 108, of appellee's brief, we note:

> "While Judge Acheson did firmly decline to take up and discuss the questions of law above named, the legitimate consequences of what he did rule affirm the propositions for which we have been contending, i. e., *that the assets of the society will go to the living members of the society at the time of its dissolution.*"

In other words, the learned Judge in the Court below did not really understand what the legal effect of his own opinion was, and that while he "firmly declined" to so rule, yet he did give the sole title to this property to the defendants and a *carte blanche* to take it whenever the spirit moved them.

The appellees took no exception and assigned no error to this ruling of Judge Acheson, but pretended they were entirely satisfied to continue the society forever. It seems to us clearly that they, having failed to assign error or take a cross appeal, the sole question for the Court on this point now is: shall the lower Court be sustained and the bill dismissed, or shall said Court be reversed on the grounds set forth in the appellant's Assignments of Error and a decree made in accordance therewith. To find affirmatively in favor of the appellees on a question decided against them in the lower Court would be most unusual. It is too late now, we respectfully contend, for these parties, after convincing the lower Court that they had no intention to dissolve the society to ask this Court to give it to them by a reversal of the lower Court. If our Assignments of Error are without merit the defendants cannot interject one of their own.

COSTS IMPROPERLY IMPOSED ON APPELLANTS. GOOD FAITH OF APPELLANTS.

In this proceeding the admitted next of kin seek the determination of certain questions affecting their right of inheritance. The matter is of equal importance to all the parties of record. The imposition of the costs upon the appellants therefore is inequitable. It was right for them to seek the judicial determination of these questions. The appellees likewise are equally interested in this proceeding.

The master "decreed that the plaintiffs' bill be and is hereby dismissed at their costs, including the commissioner's and master's fee. *The said costs however to be paid in the first instance by the defendants.*"

The master was allowed three thousand dollars and Mr. Duss paid the same. (Page 2 of Record.)

The Circuit Court said that "the bill alleges conspiracy, fraud and immorality," and therefore refused to relieve the complainants of the costs.

Independent of the monetary consideration, nothing in this case has so distressed the appellants and their counsel than the reason above given for the imposition of the costs by the lower Court.

Counsel for appellee, as is perhaps natural, has not been slow to use this feature of the case in every possible and conceivable

way. *But he goes too far*—because even with the scanty record that we have to vindicate ourselves with, it can be shown not only that no charge was made other than with absolute good faith, and we believe further that most of these charges can be shown to have such foundation as to warrant our assertion that they were true.

The conspiracies and frauds charged are fully treated of in a previous chapter in this brief and in our original brief, and we need only consider the one of immorality.

The evidence of the appellants, the master admits, proved that some of the members of the society were drunkards, and others guilty of adultery, *vide*, Record, page 178 to 181.

As to Mr. Duss: at the outset the very Court that imposed the costs upon us for charging immorality against him prevented our inquiring into them—saying: "With his alleged personal misconduct the plaintiffs have no concern;" and refused us such an examination, *vide*, Record, page 191.

It may be stated that the purpose of the appellants was to show Mr. Duss' record before he joined the society and his misbehavior therein, partly for the purpose of testing his creditability and honesty, and partly for the purpose of showing into what evil hands this old celibate society had fallen when its "spiritual leader" (under the Articles of Association) was a man of bad character and antecedents. All our offers of testimony on this subject were ruled out under objection; and notwithstanding what appellee's counsel says the master bound himself specifically in the stipulation wherein he was appointed that he would be bound by Judge Acheson's ruling heretofore cited, *vide* Record, page

The manner in which the Weggle-Kroll matter got in this case was when evidence was offered that the Board of Elders refused to discipline or expel drunken or immoral members. Considerable testimony was taken on this affecting the other members of the society, and it opened the door to this charge for it was shown that Mr. Duss' criminality with his cousin had been a matter of gossip in the society.

It had not been our expectation to refer to this matter under our present Assignments of Error, but the appellee's brief contains statements that we cannot let pass, and also omits some facts, that should clearly show the good faith of the appellants in making these charges. Of necessity now we are limited in our discussion of this question to the master's report, but with it and such of the

record as is printed we assert that the following appeared: That John Weggle, who worked on the Economy farm, testified to having found Duss in an act of criminal intercourse. Under a lengthy examination he gave a full and substantial account of it and how he happened to discover the parties. Some days later he was recalled for further cross-examination and recanted, saying that all he had first testified to was a base lie. It is here that the master, and appellees in their brief stop with their story, and nowhere in the master's report or the appellee's argument does it appear that afterwards the said Weggle was *indicted for perjury for recanting* and was convicted and sent to the penitentiary for having testified falsely when he thus recanted.

We now refer to our Forty-Eighth exception to the master's report, page 190 of the record, where the following appears:

"*Forty-eighth.* The master erred in excluding the offer of the record of the conviction and sentence of Weggle in the United States District Court showing his conviction for perjury in the recantation of his testimony charging Duss with the commission of said offense with said Fredericka R. Kroll."

The master also finds that our charge that Mr. Duss accompanied this young girl, who was at the time a member of his household, to Teed's retreat in Chicago, where she remained for more than a year, was a fact.

As we said, some of our offers of testimony to prove other charges against Mr. Duss were excluded, and as appellee's counsel says they were not, we reserve the right to bring these upon the present record if this Court deems them material; for, while we may have agreed mutually not to have all the testimony printed we surely are not bound to remain silent when opposing counsel goes out of his way to deny certain things that we say are in the record of the Court below.

This particular charge, upon which evidence was admitted, bore every evidence of truth. The charge therefore of scandalous accusations to justify the imposition of costs ought not to stand if appellants have offered testimony to sustain them, and if that testimony was admitted as relevant, as it was here, because the master has chosen to conclude that the testimony against us is to be accepted preferably to that offered to sustain them, matters not. Another master, or another tribunal might have, upon the same testimony, find or conclude the other way. Our good faith was amply sustained by the production of relevant testimony whether the master is convinced by it or not.

Consequently there being an entire absence of bad faith, we most respectfully contend, the question of costs should be determined in accordance with the rule, in such a case as this, namely, where the question to be determined by the Court is one of interpretation involving the disputed title to a large fund in which both contending parties are interested, costs should be imposed upon the fund and not upon the parties forced to ask for a judicial interpretation of the question, as well as the allowance of proper compensation for the counsel whose services were necessarily required in the premises.

Should this Court grant the relief prayed for in our bill—we most respectfully ask the Court to appoint its own receiver and master.

It is plain that a receiver should neither be Mr. Duss, or any of his intimate friends—for the necessity of a receiver investigating financial transactions covering the past ten years is apparent.

Likewise no delay should occur in the proper distribution of the assets among *all* those entitled thereto; as Mr. Duss is necessarily adverse to such a distribution he should have no voice in it. Such a partition and distribution might be prolonged indefinitely by those who would benefit by the delay.

S. SCHOYER, JR.,
GEORGE SHIRAS, 3RD,
Counsel for Appellants.